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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VINAY CHHABRA, et al., Plaintiffs and Respondents, v. LEE FERRY, Defendant and Appellant.	B221858 (Los Angeles County Super. Ct. No. BC415758)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Reversed.

Bellas & Wachowski, William Peter Boznos; Reish & Reicher and Joseph C. Faucher for Defendant and Appellant.

Scheuer & Gillett and Keith Scheuer for Plaintiffs and Respondents.

Defendant Lee Ferry appeals from the trial court's order denying his motion to compel arbitration of the claims alleged in the complaint filed against him by

plaintiffs Vinay Chhabra (Chhabra), Noops International, Inc. (Noops), Cardinal Cartridges, Inc. (Cardinal), and Bars Distribution, LLC (Bars). We reverse the order.

BACKGROUND

Ferry owned and operated Cardinal and Bars, both of which engaged in the business of, among other things, recycling and selling laser toner cartridges. Chhabra owned Noops, which engaged in similar business activities.

In February 2007, Ferry and Chhabra combined their businesses by entering three written agreements: the Stock and Membership Purchase and Plan and Agreement of Reorganization, the Operating Agreement for Members and Shareholders, and the Buy Sell Agreement (the Agreements). Through the Agreements, Chhabra acquired 51 percent ownership interest in Cardinal, Bars, and Noops, referred to as "the Affiliates," and Ferry acquired a 49 percent interest in the Affiliates. Chhabra became Chairman of the Board of Directors, Chief Executive Officer, and Chief Financial Officer for the Affiliates, and President and Secretary of Noops. Ferry became Vice-Chairman of the Board of the Affiliates, and President and Secretary of Bars and Cardinal.

Effective November 2008, Ferry resigned his positions and Chhabra terminated Ferry's employment. In June 2009, Chhabra and the Affiliates sued Ferry, alleging causes of action for fraud, breach of fiduciary duty, breach of contract, declaratory relief, and specific performance. The complaint alleged various acts of improper conduct by Ferry, including making false representations about the capital accounts of Cardinal and Bars, refusing to pay Chhabra all he was owed under the Agreements, and concealing refunds and rebates from certain third-party vendors which he diverted to his own use. The complaint sought

compensatory damages of more than $950,000, plus punitive damages, as well as a declaration under the Agreements that Chhabra is sole owner of the Affiliates and specific performance of Ferry's obligation to transfer ownership to Chhabra.

Ferry filed a motion to compel arbitration of the complaint and stay the action under the California Arbitration Act, Code of Civil Procedure section 1280, et seq. Each of the Agreements contains a clause compelling arbitration of "[a]ny claim or controversy" arising under the Agreements, following which either party may sue in court if the dispute has not been resolved. The clause states in relevant part: "Any claim or controversy arising out of or relating to this Agreement, or arising out of or relating to the Affiliates, or the rights or obligations of the Shareholders and Members as Shareholders and Members, directors, officers, or employees of the Affiliates will . . . first be determined and settled by arbitration. Should the dispute be related solely to NOOPS, such arbitration shall be held in Los Angeles County, pursuant to the Federal Arbitration Act using the Commercial Dispute Resolution Procedures of the American Arbitration Association then in effect. Should the dispute be solely related to CARDINAL or LLC[Bars], such arbitration shall be held in Will County, Illinois, pursuant to the Federal Arbitration Act using the Commercial Dispute Resolution Procedures of the American Arbitration Association then in effect. Should the dispute be related both to NOOPS and CARDINAL and/or LLC [Bars], such arbitration shall be held in Los Angeles County, pursuant to the Federal Arbitration Act using the Commercial Dispute Resolution Procedures of the American Arbitration Association then in effect. . . . [¶] In the event arbitration efforts provided herein have been unsuccessful in resolving the claim or controversy between the parties, Shareholders/Members retain the right and option to seek any and all legal or equitable remedies in the courts as follows: for claims or controversies of or

relating to this Agreement or NOOPS, Chhabra and Ferry agree to jurisdiction of the Superior Court of Los Angeles County, California; for claims or controversies of or relating to CARDINAL or LLC, Chhabra and Ferry agree to jurisdiction of the Circuit Court for Will County, Illinois."

Ferry argued that because all of the causes of action arose from the Agreements, they were covered by the arbitration clause. Chhabra and the Affiliates did not dispute that their claims fell within the scope of the Arbitration clause. Rather, they opposed arbitration on the ground that the parties had already had the nonbinding arbitration contemplated by the Agreements. In support, they produced a copy of a demand for arbitration Ferry filed with the American Arbitration Association. In the demand, Ferry named Chhabra as the respondent, and stated that the venue for the arbitration was "Will County." He described the nature of the dispute as follows: "Despite clear language in Shareholder/LLC Agreement, salary payments were cancelled to officer with no justification and refusal to pay remaining salary is vexatious and without good cause. Unjustifiable interference with employment duties and formal financial management; Improper attempt to buy out Claimant's interest in the business." He stated that the dollar amount of his claim was $160,000. According to a declaration filed by Chhabra's and the Affiliates' attorney, the attorney proposed to Ferry's attorney that they stipulate to binding arbitration to resolve the parties' issues. Ferry's attorney refused on the ground he wanted "[t]wo bites at the apple." Anticipating that the arbitration would not settle the disputes, Chhabra and the Affiliates filed their complaint in June 2009, before any arbitration was held. The arbitration was later held on a single day in September 2009, and did not resolve the disputes. Chhabra did not produce a copy of the arbitration award, and presented no evidence showing what issues were ultimately presented to the arbitrator.

In reply, Ferry produced a declaration from his attorney, who stated that he had attended the arbitration and that the only issues adjudicated related to Ferry's claims for unpaid wages and salary against Cardinal. None of the claims alleged in the complaint in the instant case was adjudicated.

At the hearing on the motion to compel arbitration, the court stated that its tentative ruling was to deny the motion. Asked for clarification, the trial court explained that the Agreements required only nonbinding arbitration and "[i]t looks like an arbitration has already gone forward." Ferry's counsel argued that the arbitration award stated that the only issue presented was Ferry's wage claim. However, he did not present a copy of the arbitration award. The court adopted its tentative ruling, denied the motion to compel arbitration, and stayed its ruling until January 27, 2010, to allow the parties (at their request) to discuss settlement. Ferry filed a timely notice of appeal.

DISCUSSION

Ferry contends that the trial court erred in denying his motion to compel arbitration. We agree.

"'[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. [Citation.]' [Citations.]" (*Fisher v. DCH Temecula*

Imports LLC (2010) 187 Cal.App.4th 601, 612.) We review the trial court's factual findings under the substantial evidence standard. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

Here, Ferry satisfied his initial burden of proving that an agreement to arbitrate existed. It is undisputed that the parties entered the Agreements, and that the arbitration clause contained in each of them covered the claims raised in Chhabra's and the Affiliates' complaint. That clause provides in relevant part: "Any claim or controversy arising out of or relating to this Agreement, or arising out of or relating to the Affiliates, or the rights or obligations of the Shareholders and Members as Shareholders and Members, directors, officers, or employees of the Affiliates will . . . first be determined and settled by arbitration."

The burden thus shifted to Chhabra and the Affiliates to prove a defense to arbitration. They introduced evidence, in the form of Ferry's prior demand for arbitration, which they characterized as showing that the nonbinding arbitration required by the Agreements as a predicate to litigation had already occurred. In Ferry's demand for arbitration, he named Chhabra as the respondent, sought $160,000 in damages, and described the dispute as follows: "Despite clear language in Shareholder/LLC Agreement, salary payments were cancelled to officer with no justification and refusal to pay remaining salary is vexatious and without good cause. Unjustifiable interference with employment duties and formal financial management; Improper attempt to buy out Claimant's interest in the business."

The trial court agreed with Chhabra and the Affiliates that the arbitration required by the Agreements had been held. However, substantial evidence does not support that factual finding.

First, Ferry's somewhat ambiguous description of his claim for $160,000 against Chhabra is insufficient to show that the "claim[s] or controvers[ies]" that Chhabra and the Affiliates' have alleged against Ferry – fraud, breach of fiduciary duty, breach of contract, declaratory relief, and specific performance, seeking, inter alia, more than $950,000 in compensatory damages as well as punitive damages – were also presented for arbitration. There is simply no evidence to show that Chhabra and the Affiliates made *any* claims or sought *any* remedies against Ferry in the prior arbitration. Second, the only evidence presented on the issues involved in the prior arbitration was the declaration of Ferry's attorney in which he stated that he had attended the one-day arbitration and that it involved only Ferry's claims for unpaid wages and salary against Cardinal. Chhabra and the Affiliates produced no evidence to contradict this declaration. Third, we note that Ferry's arbitration demand stated that the location of the arbitration was to be "Will County," and the demand was received by the "AAA Chicago Region." Under the arbitration clause, Will County, Illinois, was to be the venue for the arbitration if the dispute was "solely related to CARDINAL or LLC [Bars]." On the other hand, if the dispute involved all three Affiliates, as do the claims made in Chhabra's and the Affiliates' complaint, the venue of the arbitration was to be Los Angeles County. That the venue for the arbitration was Will County, Illinois, tends to show that it only involved issues relating to Cardinal, and not any claims involving Chhabra or the other Affiliates. For these reasons, substantial evidence does not support the trial court's finding that the previously held arbitration on Ferry's claims also encompassed the claims or controversies alleged in Chhabra's and the Affiliates' complaint against Ferry.

Chhabra and the Affiliates contend that no basis to compel arbitration exists because they "consented to and participated in the arbitration contemplated by the

Agreements and demanded by [Ferry], and the statutory elements of a petition to compel arbitration were therefore lacking." We disagree. As we have explained, the arbitration clause requires arbitration of "[a]ny claim or controversy arising out of or relating to" the Agreements, the Affiliates, or Ferry's and Chhabra's rights and obligations. No substantial evidence shows that the claims or controversies alleged in the complaint filed by Chhabra and the Affiliates were the subject of the prior arbitration. Further, it is true that Ferry did not allege that Chhabra and the Affiliates had refused a request to arbitrate made before Ferry filed his motion to compel arbitration. (See *Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640 [party seeking to compel arbitration must "plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement"].) However, that failure is not fatal to Ferry's motion. It is clear that Chhabra and the Affiliates oppose arbitration of their claims under the Agreements, on the ground that the arbitration requirement has already been met. That opposition satisfies the substance of the requirement of a refusal to arbitrate necessitating a motion to compel. Obviously, any such request prior to the motion to compel would have been futile.

Chhabra and the Affiliates also contend that it would be inequitable and wasteful to require a second arbitration. We note, however, that Chhabra and the Affiliates did not contend in the trial court, and do not contend on appeal, that the arbitration clause is unenforceable under the California Arbitration Act because it called for nonbinding arbitration. (See, e.g., *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 269 [under California law, the definition of arbitration contemplates a binding decision]; see Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2009) ¶ 3:269, p. 3-58 ["whether courts will enforce agreements calling for nonbinding ADR procedures

as a prerequisite to litigation . . . is presently unclear"].) They have thus forfeited the argument. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.) In any event, the Agreements state that the arbitration is to be held "pursuant to the Federal Arbitration Act." It has been held that the Federal Arbitration Act requires the enforcement of agreements to submit to nonbinding as well as binding arbitration. (*Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1209.) Thus, Chhabra and the Affiliates have no legitimate basis to complain about the inequity and wastefulness of referring their claims to nonbinding arbitration before resorting to litigation. They are receiving the benefit – or bearing the burden – of the Agreements they entered.

DISPOSITON

The order denying Ferry's motion to compel arbitration and stay the litigation is reversed. The court shall enter a new order granting the motion. Ferry shall recover his costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.